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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yuba)

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THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID FRANK SEARS,

Defendant and Appellant.

C069950

(Super. Ct. No. CRF100000308)

Using a screwdriver, defendant David Frank Sears fatally stabbed Stephen Lambert, who was the boyfriend of his sister, Tanya Sears. A jury found defendant guilty of second degree murder.

Defendant appeals, raising three contentions relating to the evidence and the instructions. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In July 2010, Tanya and Lambert had gotten into a fight. Tanya called defendant to tell him Lambert had "put hands on [her]." A short time later, defendant appeared in a car at the house where the fight had taken place. Defendant walked over to

Lambert (who was also in the driveway) and said, "'I'm David mother-fucking Sears.'" They argued and fought each other with their fists. Defendant then stabbed Lambert with a rusty Philips head screwdriver in an upward thrusting motion toward Lambert's heart, leaving a four-and-one-half inch exit wound in Lambert's heart. Defendant then told Lambert, "'You better go to the hospital. I got you.'" Lambert died at the hospital.

Defendant left "[r]ight after he stabbed [Lambert]." As defendant walked back to the car, one Ben Kibbe tried to talk with defendant. Defendant told Kibbe "to get out of his way, he was leaving," and he then threatened Kibbe with the screwdriver, saying, "'You want some too?'"

This was not the first time Sears had stabbed somebody. About 13 years before defendant stabbed Lambert, defendant stabbed Marty Washburn. Washburn had gotten into an argument with Tanya. Tanya called defendant to intervene. Defendant showed up and stabbed Washburn with a knife, which required Washburn to get stitches. Defendant was convicted of assault with a deadly weapon.

## DISCUSSION

### I

#### *Sufficient Evidence Supported Defendant's Conviction For Second Degree Murder On An Implied Malice Theory*

Defendant contends there was insufficient evidence of second degree murder because implied malice was lacking. We disagree.

Second degree murder is the unlawful killing of a human being with malice aforethought. (*People v. Cravens* (2012) 53 Cal.4th 500, 507.) Malice may be implied when a defendant is aware that he is engaging in conduct that endangers the life of another. (*Ibid.*) "An assault with a deadly weapon made in a manner to endanger life and resulting in death is sufficient to sustain a conviction of second degree murder, as the requisite malice is implied from the assault." (*People v. Pacheco* (1981) 116 Cal.App.3d 617, 625.)

Here, defendant stabbed Lambert with a screwdriver in an upward thrusting motion toward Lambert's heart, leaving a four-and-one-half inch exit wound. A jury could imply malice from the manner of this killing. In addition, a jury could have inferred Lambert's awareness of the deadly nature of his attack when he proclaimed, "'You better go to the hospital. I got you.'"

## II

### *The Trial Court Did Not Abuse Its Discretion*

#### *In Admitting Evidence Of The Washburn Stabbing*

Defendant contends the court erred in admitting evidence of the Washburn stabbing to prove that defendant knew that the result of stabbing Lambert with a screwdriver could be great bodily injury or death and that defendant had a common scheme or plan to commit the current offense. There was no abuse of discretion.

A trial court can admit "evidence that a person committed a crime . . . when relevant to prove some fact (such as motive,

opportunity, intent, preparation, plan, knowledge, identity, [or] absence of mistake or accident) . . . other than his or her disposition to commit such an act.” (Evid. Code, § 1101, subd. (b).) However, the court can exclude any evidence “if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice . . . .” (Evid. Code, § 352.) A trial court’s “exercise of that discretion ‘must not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]’ [Citation.]” (*People v. Rodriguez* (1994) 8 Cal.4th 1060, 1124-1125.)

The court did not abuse its discretion in concluding the Washburn stabbing tended to show defendant knew that stabbing Lambert with a screwdriver could result in great bodily injury or death. In a hearing to decide the admissibility of this evidence, Washburn testified that after defendant stabbed him in the back with a knife, Washburn went to the hospital and received stitches. A trier of fact could reasonably determine that a knife injury to a person’s back that required stitches qualified as great bodily injury. (See *People v. Nava* (1989) 207 Cal.App.3d 1490, 1495.)

The court also did not abuse its discretion in concluding the Washburn stabbing constituted defendant's common scheme or plan to stab men who had fought with his sister, when she requested he come to her aid. Both Washburn and Lambert got into arguments with Tanya shortly before defendant stabbed them. After both fights, Tanya called defendant to intervene. Defendant responded by going after both men, stabbing one in the back with a knife and the other in the heart with a screwdriver.

Finally, the court did not abuse its discretion in concluding the probative value of the evidence was not substantially outweighed by the probability that its admission would create substantial danger of undue prejudice. The court sanitized the facts of the Washburn stabbing so the jury heard only that defendant stabbed Washburn (excluding that it was in the back), which required stitches (excluding that he was hospitalized). Further, the jury was not inclined to punish defendant for the prior conduct, because it learned he was already convicted of assault with a deadly weapon for that conduct.

### III

#### *The Court Properly Gave The Flight Instruction*

Over objection, the trial court instructed that: "If the defendant fled or tried to flee immediately after the crime was committed, that conduct may show that he was aware of his guilt . . . . If you conclude that the defendant fled or tried to flee, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled or

tried to flee cannot prove guilt by itself." (CALCRIM 372.) Defendant contends the flight instruction was improper because the evidence was only that defendant "left before Mr. Lambert did." Not so.

"In general, a flight instruction 'is proper where the evidence shows that the defendant departed the crime scene under circumstances suggesting that his movement was motivated by a consciousness of guilt.'" (*People v. Bradford* (1997) 14 Cal.4th 1005, 1055.) "To obtain the instruction, the prosecution need not prove the defendant in fact fled, i.e., departed the scene to avoid arrest, only that a jury *could* find the defendant fled and permissibly infer a consciousness of guilt from the evidence." (*People v. Bonilla* (2007) 41 Cal.4th 313, 328.)

Here, the evidence was that defendant tried to leave immediately after stabbing Lambert and then threatened a person who appeared to be thwarting his escape, Ben Kibbe. Specifically, defendant tried to leave "[r]ight after he stabbed [Lambert]." As defendant walked back to the car, Kibbe tried to talk with defendant. Defendant responded by telling him "to get out of his way, he was leaving," and then he threatened Kibbe with the screwdriver, saying, "'You want some too?'" From this evidence, the trial court was warranted in concluding a flight instruction was proper because a jury could have found that defendant was so adamant on leaving the crime scene that he would do whatever he needed to escape, including stab an additional victim.

DISPOSITION

The judgment is affirmed.

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ROBIE, Acting P. J.

We concur:

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MAURO, J.

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HOCH, J.